IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.265 OF 1989

The Board of Trustees of
the Port of Bombay Plaintiff

versus

M/s.Rolex Mills Board
and another Defendants

Mr.U.J.Makhija a/w Parag Khandar i/by Mulla & Mulla & CBC for plaintiff.

None for defendants.

CORAM : A.M.KHANWILKAR, J.
DATE : 16th October 2007

PC :-

1. This suit is filed for recovery of amount from the defendants which the defendants were liable to pay towards Port Trust Pre-confiscation charges. According to the plaintiff, the plaintiffs were required to take charge of the goods discharged from ships coming to Mumbai. Under the provisions of the Major Port Trusts (Amendment) Act, 1974, the plaintiff was entitled to levy and charge wharfage, demurrage and other charges in respect of goods landed and stored by the plaintiffs in the Docks at Mumbai according to the scale of rates duly prescribed, published

and brought into force under the provisions of the Act.

2. It is the case of the plaintiff that in or about August 1985, the first defendant imported three consignments comprising of 125 pallets (first consignment), 84 pallets (second consignment) and 42 pallets (third consignment). The consignments were said to contain waste paper which were manifested at item Nos.29, 59 and 66 respectively in the Import General Manifest No.2052 dated 28th August 1985 of the Vessel s.s.‘Jalayamini’. The general landing date and the last free day of the cargo of the said Vessel fell on 23rd September 1985 and 27th September 1985 respectively. The plaintiff asserts that the first defendant was the importer and/or owner and/or consignee of the first, second and third consignments having discharged the same into the custody of the plaintiff. The defendant no.1 was bound and liable to take delivery of and clear the said first, second and third consignments within seven clear days from the date of landing thereof and to pay to the plaintiff the wharfage, demurrage and other charges which accrued thereon and were payable to the plaintiff. However, the defendant did not take any steps to take away the

consignments which, therefore, remained in the premises of the plaintiff. Accordingly, the plaintiff was required to charge according to the scale of rates which were duly prescribed, published and brought into force under the provisions of the said Act. The defendants failed to clear the first, second and third consignments and the said three consignments continued to remain on the premises of the plaintiff, which were consequently confiscated by the Customs Authority under the order passed by the Collector of Customs, dated 29th October 1986. Besides the order of confiscation, a penalty of Rs.1.00 lakh was also imposed on the first defendant in respect of four consignments under the said order. As the defendants failed and neglected to apply for and/or to take delivery of and/or to remove the said first, second and third consignments which they were bound to do, the plaintiff became entitled to recover Port Trust Charges from the defendants.

3. According to the plaintiff, for the relevant period, the plaintiff became entitled to recover a sum of Rs.33,93,322.36 Paise under the provisions of Section 48(d) read with section 59 of the said Act, which the defendants were bound

and liable to pay to the plaintiff. The plaintiff by letter dated 6th February 1988 addressed to the first defendant called upon them to pay the amount of Rs.39,92,552=36 Paise being the pre-confiscation charges in respect of first, second and third consignments, as also one more consignment which was also confiscated under the same order of the Collector of Customs. Insofar as the three consignments are concerned referred to above, the plaintiff's claim is limited to Rs.33,93,322=36 Paise. In the said notice, the plaintiff called upon the defendants to pay the amount along with interest @ 15% p.a.. The defendants did not respond to the said communication. In the circumstances, the plaintiff sent another demand notice to the first defendant on 29th March 1988 reiterating the claim set out in the earlier notice and calling upon the defendants to pay the amount along with interest. As the first defendant failed to respond to the said demands, the plaintiff gave notice to second defendant on 6th February 1988 as also on 29th March 1988 calling upon him to pay the said amount of Rs.33,93,322=36 alongwith interest @ 15% p.a. within 15 days. As the defendants did not respond to the said notices, the plaintiff eventually filed the present suit

for the following reliefs on 7th February 1988 viz. :-

> "(a) that the Defendants be ordered and decreed to pay to the Plaintiff the sum of Rs.36,85,000/- together with further interest on the sum of Rs.33,93,322.36 Paise at the rate of 15% per annum from the date of the suit till payment or realisation and costs of the suit."

4. The defendants have been duly served, however, it is only defendant no.2 who has filed written statement before this Court. The case made out in the written statement is of general denial. On the basis of rival pleadings this Court proceeded to settle and frame the issues vide order dated 17th August 2007 as under :-

> (i) Whether the Suit is barred by Law of Limitation as alleged in paragraph 2 of the Written Statement of the Defendant no.2?
>
> (ii) Whether Defendant no.2 is not the importer/owner/consignee/agent/Bailer of the Suit Consignment as alleged in Paragraph 4 & 7 of the Written Statement of Defendant no.2?
>
> (iii) Whether the Suit Consignment was confiscated by Collector of Customs vide order dated 29/10/1986 as stated in Paragraph 6 of the Plaint?
>
> (iv) Whether the confiscation of suit consignment incurred pre-confiscation port trust charges of Rs.33,93,322.36 paise as stated in Paragraph 7 of the Plaint?
>
> (v) Whether the Plaintiffs are entitled to recover the amount of Rs.33,93,322.36

being the pre-confiscation port trust charges in respect of Suit Consignment together with a sum of Rs.2,91,677.64 Paise being interest @ 15% p.a. from 6/02/1988 till 01/09/1988 aggregating to Rs.36,85,000/- as stated in Paragraph 12 of the Plaint?

(vi) To what reliefs, are the Plaintiffs entitled?

(vii) What order & Generally?"

5. After issues were settled and framed, the plaintiff proceeded to file affidavit of evidence in lieu of examination in chief sworn by Elias John Almeida, authorised officer of the plaintiff dated 5th October 2007. The affidavit so filed reiterates the case made out by the plaintiff in the claim. Besides affidavit, the plaintiff is also relying on the documentary evidence which supports the claim of the plaintiff about arrival of consignments, non payment of port trust charges by defendant no.1, confiscation order passed by the Customs authorities, demand made by the plaintiff for payment of necessary port trust charges and eventually legal notice of repayment of outstanding amount along with interest @ 15% p.a.. The plaintiff is also relying on the working sheet which gives the break-up of the suit claim amount of Rs.33,93,322.36 Paise which is marked as Exhibit E-9.

6. It is seen that the plaintiff's witness made himself available for the cross examination. However, the defendants have not appeared before the Court after filing of the written statement. Inspite of opportunity, the defendants have not chosen to cross examine the plaintiff's witness. In that backdrop, recording of evidence was closed and suit was placed for arguments. Even today, when the matter is called out, none appears for the defendants. Accordingly, I have no option but to proceed to decide the matter on the basis of the pleadings and the evidence which has come on record.

7. The first issue is whether the suit is barred by law of limitation. This question can be addressed in the first place by adverting to the assertions made by the plaintiff in paragraph 16 of the plaint. The plaintiff has stated that the charges became crystalised when the said order of confiscation was passed on 29th October 1986. It is further stated that in any event, the Last Free day for the said First, Second and Third Consignments was 27th September 1985. Taking any view of the matter, the suit filed on 7th September 1988 was within three years, for which reason it was within limitation. The facts so

stated by the plaintiff has been established from the oral as well as documentary evidence adduced by the plaintiff. The confiscation order passed by the Customs authority is indeed dated 29th October 1986. However, the original copy of the order which is produced by the plaintiff and has been marked as Exhibit P-2, clearly indicates that the said order was actually issued on 5th December 1986 and was delivered to the plaintiff on 26th December 1986. Those facts have been established by the plaintiff. Assuming for the purpose of limitation that the date of order passed by the Customs authority was to be reckoned, the fact remains that the suit has been filed in this Court on 7th September 1988, which will be within three years from the date of that order. There is also substance in the stand taken on behalf of the plaintiff that even otherwise also, for the purpose of limitation, the Court will have to take into consideration the last free date for the first, second and third consignments which is 27th September 1985. Even if that date is taken into account, the suit as filed on 7th September 1988, is well within limitation. Accordingly, I have no hesitation in answering the issue of limitation in favour of the plaintiff.

8. The next issue is whether the defendant no.2 was not importer/owner/consignee/agent/ bailer of the suit consignments, as alleged by him. The defendant no.2 has not bothered to adduce any evidence to support that claim except bare assertions in the written statement. In the circumstances, this issue will have to be answered against defendant no.2 having remained unsubstantiated.

9. Insofar as issue no.3 is concerned, I have already addressed in that behalf while considering issue no.1 on the point of suit being barred by law of limitation. As mentioned earlier, Exhibit P-2 is the order passed by the Customs Authority of confiscation. The original copy of the order received by the plaintiff has been produced. The said document has been proved by the plaintiff’s witness. The contents of the said document has already been proved by the plaintiff’s witness. The order does refer to the three consignments which are subject matter of the present suit. The said three consignments have been confiscated on the finding of default and non compliance by the defendants. In the circumstances, I have no hesitation in answering

issue no.3 in favour of plaintiff, which claim of the plaintiff is substantiated from the confiscation order itself, besides oral evidence of the plaintiff's witness.

10. Insofar as issue no.4 is concerned, the plaintiff has established the fact that the consignments were landed and received at the port imported by the first defendant. That fact is established from the Import General Manifest No.2052 dated 28th August 1985 Exhibit P-1. The plaintiff has also established the fact that the said consignments were eventually confiscated by the Customs authorities for the reasons recorded in the order dated 29th October 1986. On confiscation of the said consignments, the plaintiff became entitled to recover the port trust charges from the defendants. The plaintiff accordingly called upon the defendants to pay the port trust charges as computed. The basis of computation of the port trust charges can be discerned from Exhibit P-9 which is Working Sheet. The working sheet has duly been proved by the plaintiff's witness. The same refers to the break-up for the relevant period and the amount arrived at for such period which is payable as per the provisions of the Act. The Working Sheet

prepared by the Bills Supervisor has been duly attested and approved by the appropriate authority. The Working Sheet clearly records liability of defendants to pay Rs.33,93,322=36 Paise as on 28th October 1986, which is the date of confiscation of the consignments, a day prior to the order of confiscation of the consignments by the Customs authorities. In other words, the plaintiff has duly established their claim for recovery of port trust charges as has been computed under the Working Sheet payable by the defendants. Accordingly, the issue no.4 is answered in favour of the plaintiff.

11. The next issue is to consider the liability of defendants to pay interest and at what rate? From the pleadings as well as documents produced by the plaintiff, there is nothing to indicate that the rate of interest demanded by the plaintiff is the agreed rate of interest. The plaintiff, however, demanded interest @ 15% p.a. for the relevant period when the legal notice sent to the defendants. Indeed, the defendants have not responded to the said legal notice nor paid the outstanding amount along with interest as demanded therein. The question is whether the plaintiff will be entitled for interest at such

rate demanded in the legal notice? In my opinion, having regard to the fact that the transaction between the parties was a commercial transaction, the plaintiff would be entitled for the reasonable interest but surely not @ 15% p.a.. Instead, the interest of justice will be met by awarding interest @ 12% p.a. to the plaintiff on the outstanding amount from 6th February 1988 till realisation. The plaintiff would be entitled for further interest at the rate of same rate i.e. @ 12% p.a. on the principal amount.

12. Accordingly, the suit is decreed on the following terms :-

(a) The defendants are ordered and decreed to pay to the plaintiff a sum of Rs.33,93,322=36 Paise along with interest thereon @ 12% p.a. from 06th February 1988 till payment or realisation of the same along with costs of the suit;

(b) Decree be drawn up accordingly.

(A.M.KHANWILKAR, J.)

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None for defendants.

CORAM : A.M.KHANWILKAR, J.
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PC :-

1. The plaintiffs have filed compilation of documents which is already taken on record. In my previous order I have already recorded that recording of evidence is closed. That is because of the fact that no one appeared for the defendants to cross examine the plaintiffs witness. However, what remained to be recorded in the previous order, is of issuing direction to exhibit the documents forming part of the compilation. In my opinion, the documents at serial numbers 1 to 9 will have to be exhibited in serial as Exhibits P-1 to P-9 respectively,

inasmuch as the defendants have not appeared to dispute the existence of the said documents.

2. On the other hand, the plaintiffs witness has already proved the said documents by way of affidavit of evidence in lieu of examination-in-chief which case has remained uncontroverted. Accordingly, documents at serial nos.1 to 9 be exhibited as Exhibits P-1 to P-9.

(A.M.KHANWILKAR, J.)